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In the

SUPREME COURT OF THE UNITED STATES

No. ~~975~~ 41

THE CHEROKEE NATION OF TRIBE OF INDIANS OF OKLAHOMA,
Petitioners,

VERSUS

STATE OF OKLAHOMA, ET AL.,
Respondents,

THE CHOCTAW NATION and the CHICKASAW NATION,
Petitioners,

VERSUS

STATE OF OKLAHOMA, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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In the
Supreme Court of the United States

No. .....

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Choctaw and Chickasaw Nations, petitioners herein, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered on the 31st day of October, 1968, in causes numbered 9924 and 9925 in that court.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Tenth Circuit in each of these cases was entered on the 31st day of October, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTIONS PRESENTED

Was the cession by Congress of lands west of the Mississippi to the Choctaws by the Treaties of 1820 and 1830 a purpose appropriate to the objects for which the United States held the territory?

When the Treaties of 1820 and 1830 were entered into was it understood between the United States and the Choctaws that the area ceded to the Choctaws was to be embraced within a future state?

STATEMENT OF THE CASE

This case involves the ownership of the avulsed beds and the soil and minerals underlying the navigable portion of the Arkansas River in Oklahoma. The State of Oklahoma claims to own all of the bed of the navigable portion of the Arkansas River within Oklahoma. The Choctaw and Chickasaw Nations also claim to own all of the bed of the navigable portion of the Arkansas River within Oklahoma. The Cherokee Nation contends that the thread of the river is the prescribed boundary between the Cherokee Nation to the north and the Choctaw Nation to the south and claims to own the bed of the navigable portion of the Arkansas River lying in the interior of the Cherokee Nation.

This action was commenced by the Cherokee Nation against the State of Oklahoma and others. The Choctaw and Chickasaw Nations intervened. The trial court entered judgment quieting title in the State of Oklahoma. The court below affirmed that judgment.

STATEMENT OF THE FACTS

Shortly after 1800 great pressures were brought upon the Federal Government to move the Indians out of the southern states. By the Treaty of 1817 the Cherokees gave up their lands in the southern states in exchange for a fee simple title to land in what is now Arkansas.

Article V of that treaty recited that the land ceded to the Cherokees ". . . is to commence on the north side of the Arkansas River, at the mouth of Point Remove or Budwell's Old Place; thence by a straight line northwardly to strike Chataunga mountain, or the hill first above Shield's Ferry on White River, running up and between said rivers for complement, the banks of which rivers to be the lines . . ."

By the Treaty of Doak's Stand in 1820[1] the Choctaws exchanged the southwestern portion of their territory in Mississippi for the fee simple title to a wild tract of country in what is now the southern half of Oklahoma and a section of southwestern Arkansas. By that treaty the Choctaws were ceded the fee title to a tract of land west of the Mississippi River bounded as follows: "Beginning on the Arkansas River where the lower boundary of the Cherokee strikes the same; thence up the Arkansas to the Canadian Fork; and up the same to its source; thence due south to Red River; thence down Red River three miles below the mouth of Little River which empties into Red River on the north side; thence in a direct line to the beginning."

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[1] 7 Stat. 210, Proclamation, January 8, 1821.

Before the Choctaws had time to enter in possession of their new territory it was discovered that the land ceded to them in Arkansas was already occupied by white settlers. The Federal Government, realizing the difficulty of dislodging these white families, decided to induce the Choctaws to relinquish the land in Arkansas. In 1824 a delegation of Choctaws were invited to Washington to negotiate a treaty that would relocate the eastern boundary of the land ceded to them by the Treaty of 1820. On November 9, 1824, John C. Calhoun, the Secretary of War, addressed a letter to the Choctaw delegation then in Washington in which he said: *"There is no probability that any State or territory will be erected to the west of the Arkansas territory . . ."*[2]

A treaty was entered into on January 20, 1825 in the City of Washington[3] by which the Choctaw Nation retroceded to the United States: ". . . all that portion of the land ceded to them by the second article of the Treaty of Doak Stand, as aforesaid, lying east of a line beginning on the Arkansas, one hundred paces east of Fort Smith, and running thence due south to Red River; it being understood that this line shall constitute, and remain, the permanent boundary between the United States and the Choctaws; and the United States agreeing to remove such citizens as may be settled on the west side to the east side of said line, *and prevent future settlements from being made on the west thereof.*"

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[2] Ameican State Papers, Indian Affairs, Vol. II, pp. 549-551.

[3] 7 Stat. 234, Proclamation, February 19, 1825.

The emigration contemplated in the Treaty of 1820 was slow.[4]

In 1826 General William Clark, General Thomas Hinds, and General John Coffee, as Commissioners for the United States, held a council with the Choctaws in Florence, Alabama. In an address on November 11, 1826, they said to the Choctaws:

> "The United States have a large unsettled and unappropriated land on the west side of the great river Mississippi, *unto which they do not intend that their white settlers shall extend.*"[5]

On the 13th of November the commissioners submitted for the consideration of the Choctaws the terms upon which they were authorized to propose a cession by the Choctaws of their remaining lands in the State of Mississippi. The commissioners brought to the attention of the Choctaws the object of their mission, saying:

> ". . . but if you are satisfied that under such condition of things you cannot be happy, consent to move beyond the Mississippi, where you will be away from the white people and from their laws, and be able to live under your own.
>
> * * * * * * *
>
> ". . . and your white father can bring you forth; and can keep the white mans laws from interrupting and disturbing you; and there I will guard you against

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[4] By 1829 about 150 Choctaws had been induced to settle in their new territory. Debo, *Rise and Fall of the Choctaw Republic*, at page 50.

[5] American State Papers, Indian Affairs, Vol. II, page 711.

all enemies, whether they be white or red; *and no State or Territory will be created.*"[6]

The next year, the Superintendent of Indian Affairs made a special trip to the Choctaw country to induce them to remove.[7]

On May 30, 1829 the Secretary of War instructed the commissioners, Carroll and Coffee to bribe the Chiefs and Head Men by offers of extensive reservations in fee simple and other rewards.[8]

But, the people of Mississippi did not wait for the success of these Federal schemes for the removal of the Choctaws. In 1829 the Legislature provided for the extension of State laws over Choctaw and Chickasaw land adjacent to organized counties. And on January 19, 1830, Tribal governments were abolished under penalty of fine and imprisonment to any Indian who should exercise the "office of Chief, Mingo, Head Man, or other post or power established by the Tribal Statutes, ordinances or customs of the Indians."[9]

On February 22, 1873 the Committee of Indian Affairs in a report to the House of Representatives of the Third Session of the 42nd Congress in reviewing these events said: "The course adopted by the State of Mississippi was

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[6] Senate Document 512, Vol. II, pages 255-258.

[7] Niles Register XXXIII (1827) 274.

[8] Speeches on Passage of the Bill for the Removal of Indians (New York 1830) page 4.

[9] Laws of Colonial State Governments relating to Indians and Indian Affairs from 1633 to 1831 inclusive (Washington 1832) pp. 242-243; see also Niles Register XXXVIII (1830) 73.

necessarily compelling a conflict of authority between the United States and the State of Mississippi, or else an abandonment by the United States of its former treaty-stipulations with the Choctaws, and a gross violation of its agreements with them, by which it had received of the Choctaws vast tracts of country in said States of Mississippi and Alabama."

On May 28, 1830 Congress passed an act which provided: [10]

> *"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* that it shall and may be lawful for the President of the United States to cause so much of any territory belonging to the United States, west of the river Mississippi, not included in any state or organized territory, and to which the Indian title has been extinguished, as he may judge necessary, to be divided into a suitable number of districts, for the reception of such tribes or nations of Indians as may choose to exchange the lands where they now reside, and remove there; and to cause each of said districts to be so described by natural or artificial marks, as to be easily distinguished from every other.
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> * * * * * * *
>
> Sec. 3. *"And be it further enacted,* that in making of any such exchange or exchanges, *it shall and may be lawful for the President solemnly to assure the tribe or nation with which the exchange is made, that the United States will forever secure and guarantee to them, and their heirs or successors, the country so exchanged with them,* and, if they prefer it, that the

[10] Commonly called "The Removal Act"; U. S. Statutes at Large IX 411-12.

United States will cause a patent or grant to be made and executed to them for the same."

Shortly before Andrew Jackson took office as President, Georgia tore up Federal treaties and annexed the territory of the Cherokee and Creek Nations. Mississippi and Alabama did likewise in the case of the Choctaws and Chickasaws. The answer of the Cherokees was to engage William Wirt of Baltimore, formerly Attorney General and an eminent constitutional lawyer, to take their case into court on the issue denying a state's right to annul a Federal contract. As no state possessed this right, the outcome of any suit, once it should reach the Supreme Court, seemed a foregone conclusion.[11]

Andrew Jackson, fearing the outcome of *Worcester* v. *Georgia* and never being one to assume a posture of meekness toward the courts (particularly where Chief Justice John Marshall was concerned), directed his Secretary of War, John H. Eaton, to arrange a meeting with the Choctaws and Chickasaws at Franklin, Tennessee for August 23, 1830. So on June 1st, four days after the passage of the Removal Act, Secretary Eaton wrote the Choctaws inviting them to meet with him and the President at Franklin, Tennessee. He professed the benevolent purpose of the Government to remove them from the hostile jurisdiction of Mississippi saying:[12] "Congress has passed a law manifesting a desire that you should remove and have liberally prepared the means for taking care of you."

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[11] *Worcester* v. *Georgia*, 6 Pet. 515 (1832).

[12] Senate Document 23d Congress, 1st Session, 512 II, 3).

Commenting on the remarkable circumstance of the President of the United States journeying to an Indian Council Ground for the purpose of making a treaty, Marquis James said in his Pulitzer Prize winning biography of Jackson:[13] "General Jackson traveled westward to cut the ground from under the courts by persuading as many Indians as possible to agree to emigrate before any suit should come up for adjudication. Of the Choctaws and Chickasaws he had strong hope . . ."

When Jackson reached the meeting place only the Chickasaws had appeared. His overtures to the Chickasaws were characteristic of the advances his commissioners were to make to the Choctaws the following month at Dancing Rabbit Creek. They show beyond controversy the intent of the Government that the lands west of the Mississippi to which the southern Indians were proposed to be moved would never become a part of any State or Territory. Hear the suasions of Jackson:[14]

> ". . . Brothers, you have long dwelt upon the soil you occupy; and in early times, before the white man kindled his fires too near to yours, and by settling around, narrowed down the limits of the chase, you were, though uninstructed, yet a happy people. Now, your white brothers are around you; they compass you about every where; states have been created within

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[13] Andrew Jackson (Portrait of a President) by Marquis James, Vol. 2 at page 246.

[14] Senate Documents Indian Removals 23d Congress 1st Session. Document 512 (Vol. II) Correspondence on the subject of the Emigration of Indians, between November 30, 1831 and December 27, 1833. (Washington: Printed by Duff Green 1835) No. 245, pp. 240, 241, 242.

your limits, which claim a right to govern and control your people as they do their own citizens, and to make them answerable to their civil and criminal codes. Your great father has not the authority to prevent this state of things, and he now asks if you are prepared and ready to submit yourselves to the laws of Mississippi; make a surrender of your ancient laws and customs, and peaceably and quietly live under those of the white man.

* * * * * * *

"Brothers, listen: to these laws, where you are, you must submit, there is no preventative, no alternative. Your great father cannot, nor can Congress, prevent it; the states only can. What then? Do you believe that you can live under those laws? That you can surrender all your ancient habits, and the forms by which you have been so long controlled? If so, your great father has nothing to say or to advise. He has only to express a hope, that you may find happiness in the determination you shall make, whatever it may be. His earnest desire is, that you may be perpetuated and preserved as a nation; and this, he believes, can only be done and secured by your consent to remove to a country beyond the Mississippi, *which, for the happiness of our red friends, was laid out by the Government a long time since, and to which it was expected, ere this, they would have gone.* Where you are, it is not possible you can live contented and happy. Besides, the laws of Mississippi which must operate upon you, and which your great father cannot prevent, white men, continually intruding, are with difficulty kept off your lands, and every day inconveniences and difficulties continue to increase around you.

* * * * * * *

"Brothers, listen: The only plan by which this can be done, and tranquillity for your people obtained, is,

that you pass across the Mississippi to a country in all respects equal, if not superior, to the one you have. Your great father will give it to you for ever, that it may belong to you and your children while you shall exist as a nation, free from all interruption.

* * * * * * *

"Peace invites you there, annoyance will be left behind; *within your limits, no State or Territorial authority will be permitted;* intruders, traders and above all, ardent spirits, so destructible to health and morals, will be kept from among you, only as the laws and ordinances of your nation may sanction their admission."

Marquis James recounts: [15] "The Indian dignitaries retired for consultation. General Jackson stepped into his carriage and drove away, leaving John Henry Eaton and General John Coffee to complete the negotiations. At the Hermitage he received word of the Chickasaws capitulation. They would cross the Mississippi in 1832. Meantime the Choctaws agreed to treat. Directing Eaton and Coffee to meet them, the President set out for Washington the first week in September."

Secretary Eaton and General Coffee proceeded from Franklin, Tennessee to Dancing Rabbit Creek in Mississippi where they met with the Choctaws on September 15, 1830. On September 18th they exhorted the Choctaws:

"Brothers: hesitate not, determine what you mean to do on this important occasion; record the votes of your head-men, and let us know who amongst you are

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[15] Andrew Jackson (Portrait of a President) by Marquis James, Vol. 2 at page 248.

willing to remove and who are opposed. The sense of the nation will thus be correctly ascertained, and the question which has so much agitated you be finally put to rest: say it is your determination to remain, and the subject is done with—we shall then trouble you with our talks no more. But decide to remove, and liberal provisions will be made to carry you to a country where you can be happy, and where already your fathers and brothers have gone in peace to reside. It is a desirable region, double in extent to the one you occupy, and large and fertile enough for twice or three times the number of people you have. There your great father can be your friend; there he can keep the white man's laws from interrupting and disturbing you; and there, too, he will guard you against all enemies, whether they be white or red. *There no State or Territory will be created* and he will have it in his power to protect you fully in your usages, laws, and customs. Here he cannot do these things, because neither he nor Congress possess authority to prevent the States from extending their jurisdiction over you, and throughout their limits.

* * * * * * *

"Brothers: a fertile country beyond the Mississippi and another possessed here, is more than you should expect. If you will not remove other Indian tribes may desire to do so; and, where they shall select to settle, a home must be furnished: others wanting it, the country should not remain a desert. You must decide which you will take, and which you will live upon: both countries you cannot possess—it is unreasonable to expect it. If you prefer to live under our laws and customs, remain and do so, and surrender the lands assigned to you west of the Mississippi, or otherwise remove to them. There your great father can protect you; and there, undisturbed and uninterrupted by the

whites, you can enjoy yourselves, be happy, now and for years to come . . ."[16]

A treaty was concluded on September 27th and a supplement was adopted on September 28th.[17] It provided that "The United States under a grant specially to be made by the President of the U. S. shall cause to be conveyed to the Choctaw Nation a tract of country west of the Mississippi River, *in fee simple* to them and their descendants, to inure to them while they shall exist as a nation, and live on it, beginning near Fort Smith where the Arkansas boundary crosses the Arkansas River, running thence to the source of the Canadian Fork; *if in the limits of the United States,* or to those limits; thence due south to Red River, and down Red River to the west boundary of the Territory of Arkansas; thence north along that line to the beginning. The boundary of the same to be agreeably to the Treaty made and concluded at Washington City in the year 1825. The grant to be executed so soon as the present Treaty shall be ratified."

Article IV of the treaty provided that: "The Government and people of the United States are hereby obliged to secure to the said Choctaw Nation of Red People by jurisdiction and government of all the persons and property that may be within their limits west, *so that no territory or State shall ever have a right to pass laws for the*

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[16] Senate Documents Indian Removals, 23d Congress, 1st Session, Document 512. American State Papers, Indian Affairs, Vol. II, pp. 256, 257, 258.

[17] Treaty at Dancing Rabbit Creek September 27, 1830, 7 Stat. 333, Proclamation February 24, 1831.

government of the Choctaw Nation of Red People and their descendants; and that no part of the land granted to them shall ever be embraced in any Territory or State; . . ."[18]

For three-quarters of a century this guarantee was to be the Magna Carta of the national existence of the Choctaw Nation.

THE DECISION OF THE COURT BELOW

The Circuit Court's decision is premised on the conclusion that when the United States ceded the land in what is now a part of Oklahoma to the Choctaws by the Treaty at Doak's Stand in 1820 there was a well-grounded intention that the area should later be embraced by a state.[19]

While the title to the beds underlying navigable waters passes to the new states under the "equal footing doctrine,"

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[18] The removal of the Five Civilized Tribes from the southern states was a concerted effort. It was intended that they should all be removed to lands west of the Mississippi. Article V of the treaty concluded at New Echota on the 29th day of December 1835 (7 Stat. 478 Proclamation May 23, 1836), provided that: "The United States hereby covenant and agree that the lands ceded to the Cherokee Nation in the foregoing Article I, in no future time without their consent, be included within the territorial limits or jurisdiction of any state, or territory."

[19] The court in its opinion (Appendix, p. xi) said: "Nothing in the treaties, statute or conveyances establishes an intent by the *United States, as trustee for states to be formed,* to convey away property *held for the benefit of the new states.*" (Emphasis supplied) and at page xiv of our Appendix the court below said: "It requires a clear and definite intent to convey the beds of navigable streams *which otherwise would pass to a state on admission* . . . The responsibility of the United States *to the new states* is not less than its responsibility to the Indians." (Emphasis supplied.)

the court below recognized that this Court had established in *Shively* v. *Bowlby*, 152 U.S. 1, 48, that Congress had the power to grant land below navigable waters in a Territory when necessary to carry out public purposes appropriate to the objects for which the United States held the territory.[20] But, said the court below, under *United States* v. *Holt State Bank*, 270 U.S. 49, 55, the intent of Congress to dispose of the soil under the waters of navigable streams during the territorial period must be "definitely declared or otherwise made very plain."[21]

The question, said the court below, is whether the circumstances surrounding the treaties at Doak's Stand in 1820 and at Dancing Rabbit Creek in 1830 ". . . make that intent *very plain*."[22]

Recognizing that *Holt State Bank* did not deal with a claim presented by Indians and that the United States was not a party to the case, the court below said that it nonetheless believed that the rule announced in that decision must apply to the instant case, saying: "It requires a clear and definite intent to convey the beds of navigable rivers which otherwise would pass to a state on admission * * * The responsibility of the United States to the new states is not less than its responsibility to the Indians * * * Nothing in the treaties, statutes and conveyances establish an intent by the United States, as trustee for states to be

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[20] Appendix, pages vii and viii.

[21] Appendix, page viii.

[22] Appendix, page x.

formed, to convey away property held for the benefit of the new states."[23]

The court below pointed out that in treaties with other tribes the United States had agreed that the territory ceded or reserved to the Indians would not be embraced in any State or Territory. But states were in fact later formed that would embrace these tracts.[24]

Evidently the court below felt that a chaotic condition might result if it should be said that a State could be admitted to the Union without becoming the owner of the soil under the navigational waters within its boundaries. Thus said the court:[25] "From a practical standpoint, the equal footing principle must be recognized and maintained. There is no place in our federal system for a second-class state. * * * The acceptance of this position would have widespread implications because as we have seen, other states were created in areas covered by Indian Treaties having similar provisions to those found in the treaties of New Echota and Dancing Rabbit Creek."[26]

While we shall comment on it later it is well to observe at this point, however, that the decision of the court below turned on its construction of *United States* v. *Holt State Bank*. In that case this Court said[27] that where Congress had granted lands underlying navigable waters by

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[23] Appendix, page xiv.

[24] Appendix, pages vi and x.

[25] Appendix, page x.

[26] Appendix, pages x and xi.

[27] 270 U.S. 49, 54, 55.

way of carrying out public purposes appropriate to the objects for which the territory was held:

> "Such rights are not cut off by the subsequent creation of the state, but remain unimpaired, and *the rights which otherwise would pass to the state in virtue of its admission to the Union are restricted or qualified accordingly.*" (Emphasis supplied.)

At this point in its opinion the court below said that it believed that the provisions that no states would be created in the areas west of the Mississippi ceded to the Choctaws ". . . had to do with the exercise of political power rather than property rights. The political aspects were changed by the Indians' acceptance of the treaty provisions concerned with the creation of State and Territory governments."[28]

The definition of terms in the sentence: "We believe that such provisions had to do with the exercise of political power rather than with property rights" is clarified in the next paragraph of the opinion of the court below where it said: "We are concerned with a property right—not with a navigational right. The recognition in the treaties of the constitutional power of the United States, if it has any effect at all, negatives any intent to convey the riverbed."[29]

We gather that by this language the court below is reiterating its belief that in treating with the Choctaws the United States intended that the bed of the navigable por-

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[28] Appendix, page xi.

[29] Appendix, page xi.

tion of the Arkansas was not to be included in the grant but was to be withheld by the United States in trust for a future state that would embrace that area.

We must dwell for a minute on the conclusion of the court below that the recognition in the treaties with the Choctaws and the Cherokees of the constitutional power of the United States, ". . . if it has any effect at all, negatives any intent to convey the riverbed." The court by footnote refers to Article IV of the Treaty with the Choctaws of 1830[30] and Article V of the Treaty with the Cherokees of 1835.[31] These two articles are substantially the same. In each of them the Government covenanted that they would secure to the respective tribes the jurisdiction and government of all the persons and property that may be within their limits west, so that no Territory or State shall ever have a right to pass laws for the government of the Tribes; and that no part of the land granted to them should ever be embraced in any Territory or State; but that the United States should forever secure the Tribes from and against all laws except such as from time to time may be enacted by their own councils, not inconsistent with the Constitution, Treaties and laws of the United States.

It is respectfully suggested that by these Articles the United States was saying to the Tribes: "The lands granted to you shall never be embraced by any State or Territory and you may govern yourselves except that you shall pass

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[30] 7 Stat. 333.

[31] 7 Stat. 478.

no law contravening the Constitution, Treaties or laws of the United States." No matter how earnestly one searches there cannot be found in those Articles any intent, expressed openly or esoterically, to withhold the soil underlying navigable waters from the grant.

REASONS FOR GRANTING THE WRIT

It is well established that Congress has the power to grant land below navigable waters in a Territory when necessary to carry out public purposes appropriate to the objects for which the United States holds the Territory.[32]

These questions are posed: *First,* did the Indian Removal Act of 1830[33] making it lawful for the President of the United States to remove the southern Indians to the Territory west of the Mississippi River and ". . . to assure the Tribe or Nation with which the exchange is made, that the United States will forever secure their guarantee to them, and their heirs or successors, the country so exchanged with them, and, if they prefer it, that the United States will cause a patent or grant to be made and executed to them for the same" evince a public purpose that was appropriate to the object for which the United States held the Territory? *Second,* was the granting to the Choctaws of a fee simple title to the lands ceded to them in what is now Oklahoma a purpose appropriate to the object for which the United States held the Territory? *Third,* was the removal of the Choctaws and Cherokees from the

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[32] *Shively* v. *Bowlby,* 152 U.S. 1, 48.

[33] U. S. Statutes at Large IX 411-42.

southern states to the lands west of the Mississippi an "exceptional circumstance"? *Fourth,* Was it made "very plain" to the Choctaws that as a condition to their removing to the wild lands in what is now Oklahoma the lands granted to them would never be embraced by a state? *Fifth,* If there is a "well founded doubt" as to whether the United States intended to reserve the soil underlying the navigable portion of the Arkansas River from the grant of the treaties at Doak's Stand in 1820 and at Dancing Rabbit Creek in 1830 and its patent of 1842, in whose favor should the doubt be resolved?

Under the Constitution, the United States has the power to convey a fee simple title to Indian Tribes.

Indian Tribes are capable of taking lands as owners in fee simple by purchase where the United States for a valuable and adequate consideration so sell such lands to them.[34]

In an opinion delivered by Mr. Justice Reed, in *Hynes* v. *Grimes Packing Company,* 337 U.S. 86, 103, 104, 93 L.Ed. 1231, 1247, the Court said:

> "Since Congress, under the Constitution, Section 3 of Article 4, has the power to dispose of the lands of the United States, it may convey to or recognize such rights in the Indians, *even a title equal to fee simple, as in its judgment is just.* Northwestern Band of Shoshone Indians v. United States, 324 U. S. 335, 339, 340, 89 L. ed. 985, 990, 991, 65 Sup. Ct. 690." (Emphasis supplied.)

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[34] 42 C.J.S. 694, 27 Am. Jur. 566 and authorities cited thereat.

By the Treaty at Doak's Stand in 1820 and the Treaty at Dancing Rabbit Creek in 1830, the United States conveyed to the Choctaw Nation the fee simple title to the lands west of the Mississippi situated in what is now Oklahoma.

By Article I of the Treaty concluded at Doak's Stand on April 18, 1820, the Choctaws ceded to the United States a part of the lands owned by them in Mississippi.[35] Article II of the Treaty provides:

> "For and in consideration of the foregoing cession on the part of the Choctaw Nation, and in part satisfaction for the same, the Commissioners of the United States on behalf of the United States, do hereby cede to said Nation, a tract of country west of the Mississippi River . . ."

On September 27, 1830, the United States entered another treaty with the Choctaws at Dancing Rabbit Creek[36] by which the Choctaws ceded to the United States the rest of the land they owned in Mississippi. The treaty provided for minor gifts to the Indians and by Article II the United States again conveyed to the Choctaw Nation the lands west of the Mississippi River situated in what is now Oklahoma:

> ". . . in fee simple, to them and to their descendants, to inure to them while they shall exist as a nation and live on it . . ."

Mr. Justice Holmes speaking for the Court in *Fleming* v. *McCurtain*, 215 U.S. 56, 59, 54 L.Ed. 88, 91, said:

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[35] 7 Stat. 210.

[36] 7 Stat. 333.

"We should mention, however, that the United States already had ceded this tract to the Choctaw Nation with no qualifying words by the Treaty of October 18, 1820 (Art. II, 7 Stat. at L. 210 Choctaw Nation v. United States, 119 U. S. 1, 38, 30 L. ed. 306, 318, 7 Sup. Ct. Rep. 75. The Treaty of 1830 only varied the description a little and provided for a special patent."

The conveyance of the fee title to the lands in Oklahoma to the Choctaws by the Treaties of 1820 and 1830 and by the patent of 1842 and the removal of the Choctaws on to those lands were each "a public purpose appropriate to the objectives for which the United States held the Territory."

The desire of the Federal Government to move Indians out of the southern states is such a commonly known fact that the Court may take judicial notice of it. It would be an unnecessary labor upon the Court to cite the endless historical writings on the subject. But this desire was succinctly expressed by Generals Clark, Thomas and Hinds, who, as commissioners of the United States negotiating for the removal of the Choctaws, said to them in an address at the Treaty Ground of the Choctaw Nation on November 11, 1826: "The United States have a large unsettled and unappropriated country on the west side of the great river Mississippi, into which they do not intend that their white settlers shall extend. This is the country in which our father the President intends to settle all of his Red children. * * * We shall now proceed to state the views which the General Government of the United States has at present in contemplation. It is the policy and interest of the Government to extinguish the Indian title to all the lands on this side of the Mississippi."[37]

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[37] American State Papers, Indian Affairs, Vol. II, page 741.

For brevity it need only be added that the Indian Removal Act of 1830 making it lawful for the President of the United States to cause so much of any territory belonging to the United States west of the Mississippi River not included in any state or organized territory and to which the Indian title had been extinguished, as he may judge necessary, to be divided into a suitable number of districts, for the reception of such tribes or Nations of Indians as he might choose to exchange the lands where they now reside and remove them there, clearly evinced a public purpose that was appropriate to the objects for which the United States held the territory.

It can not be said that the United States intended to reserve the bed of the navigable portion of the Arkansas for the benefit of a future state.

John C. Calhoun, the Secretary of War of the United States, urging the Choctaws to retrocede to the United States that part of their lands lying in Arkansas, said to their delegation in Washington in 1824: *"There is no probability that any State or territory will be erected to the west of the Arkansas territory . . ."*[38] Two months later Calhoun's negotiations with the Choctaw delegation in Washington resulted in the Treaty of 1825,[39] which established the permanent boundary line between the United States and the Choctaws and in which the United States agreed in reference to such line that it would ". . . *prevent future settlements from being made on the west thereof.*"

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[38] 7 Stat. 234, Proclamation, February 19, 1825.

[39] American State Papers, Vol. II, pages 549-550.

On November 11, 1826 at the Treaty Grounds of the Choctaws, General William Clark, General Thomas Hinds and General John Coffee said to them: "The United States have a large unsettled and unappropriated country on the west side of the great river Mississippi *into which they do not intend that their white settlers shall extend.* This is the country in which our father the President intends to settle all his Red Children."

In urging the Chickasaws to move to the west President Jackson said to them in August, 1830 at Franklin, Tennessee: "Peace invites you there, annoyances will be left behind; *within your limits no State or territorial authority will be permitted.*"

Jackson's Secretary of War, John H. Eaton, and General Coffee were with him at Franklin, Tennessee. On his instructions they proceeded on to Dancing Rabbit Creek in Mississippi where they met with the Choctaws on September 15, 1830. On September 18th they exhorted the Choctaws to move to the country west of the Mississippi, pledging to them that out of the lands to be ceded them, west of the Mississippi, ". . . *no State or Territory will be created . . .*"[40]

Article IV of the treaty concluded with the Choctaws at Dancing Rabbit Creek on September 27, 1830 was a result of these pledges. It provided that:

> "The Government and people of the United States are hereby obliged to secure to the said Choctaw Nation of Red People by jurisdiction and government of

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[40] Senate Documents Indian Removals 23d Congress, 1st Session, Document 512. American State Papers, Indian Affairs, Vol. II, page 257.

all the persons and property that may be within their limits west, so that no territory or State shall ever have the right to pass laws for the government of the Choctaw Nation of Red People and their descendants; and that *no part of the land granted to them shall ever be embraced in any Territory or State; . . .*"

The Treaty of Dancing Rabbit Creek, September of 1830 was negotiated by the Secretary of War, John H. Eaton, and General John Coffee for and in behalf of the United States, with Greenwood LeFlore, Moshulatubbee, and Nitakechi, for the Choctaws. We can imagine the following conversation between Mr. Eaton for the United States and Moshulatubbee for the Choctaws at the signing of the treaty:

Mr. Eaton: The treaty is ready for our signatures, and there is nothing wrong with what has been written, but I now see that an important provision has been omitted.

Moshulatubbee: What is that?

Mr. Eaton: There should be a provision in the treaty that the United States reserves the ownership of the sands and soils in the bed of the Arkansas River.

Moshulatubbee: Why in the world would you want a long strip of sand and soil in the heart of the Indian country?

Mr. Eaton: The Arkansas is a navigable river, and it has long been the policy of the United States to reserve the beds of navigable rivers for future states.

Moshulatubbee: But, you forget that this treaty provides that no state or territorial government shall

ever be established along the lands that you have granted us, and the Cherokee treaty to the north contains a like provision.

Mr. Eaton: But we need this provision. The War Department through its engineers needs to remove the stumps from the river so we can get our boats up to Fort Gibson.

Greenwood LeFlore: But in Article IV you have provided that the laws passed by the Choctaws' National Council shall be not inconsistent with the Constitution, treaties and laws of the United States, and your power to regulate commerce is enough for your purpose without ownership of the riverbed.

United States v. Holt State Bank is not a relevant precedent because without any qualifying words the Government conveyed to the Choctaws a fee simple title to the lands ceded to them in what is now Oklahoma and further guaranteed ". . . that no part of the land granted to them shall ever be embraced in any Territory or State."

On discovery of the American continent, the principle was asserted and acknowledged by all European nations that discovery followed by actual possession gave title to the Government by whose subject and authority it was made, not only against other European governments, but against the natives themselves.[41]

In the United States, the right of the European discoverers, having been succeeded to by the states or by the Federal Government, the Indian title to land is a right of possession and occupancy, the fee being in the Federal

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[41] *Butts* v. *Northern Pacific Railway*, 7 Sup.Ct. 100, 119 U.S. 55; *Beecher* v. *Wetherby*, 95 U.S. 517.

Government.[42] However, under the Constitution the United States has the power to convey a fee simple title to Indian Tribes.[43]

In *United States* v. *Holt State Bank*[44] the fee was in the United States, the Indians having only a right of occupancy. In the case at bar, however, the fee was in the Choctaws. This significant fact interdicts *United States* v. *Holt State Bank*.[45]

The claim of the Choctaws in the case at bar is bottomed on the premise that by the treaties of 1820 and 1830 and the patent of 1842 they became the owners of the fee simple title to the lands ceded to them in what is now Oklahoma and in making the grant to them the Government guaranteed that the area would never be embraced by any State or Territory. Conversely, *United States* v. *Holt State Bank* is bottomed on the premise that the fee to the lands involved there was vested in the Government,

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42 *U. S.* v. *Santa Fe Pacific Railway Company*, 314 U.S. 339, 312 U.S. 695; *M. K. & T. Railway Co.* v. *U. S.*, 235 U.S. 37.

43 *Hynes* v. *Grimes Packing Company*, 337 U.S. 86, 103, 104.

44 270 U.S. 49, 70 L.Ed. 465.

45 The case at bar deals with the construction of Article II of the Treaty entered into with the Choctaws at Dancing Rabbit Creek on September 27, 1830 (7 Stat. 333) which provides: "The United States under grant especially to be made by the President of the United States shall cause to be conveyed to the Choctaw Nation a tract of the country west of the Mississippi river *in fee simple . . .*" *United States* v. *Holt State Bank* dealt with the Chippewa treaty entered in the City of Washington on February 22, 1855 (10 Stat. 1165), the first article of which provided: "And the said Indians do hereby fully and entirely relinquish and convey to the United States any and all right, title and interest, of whatever nature the same may be, which they may now have, and to any other lands in the Territory of Minnesota or elsewhere."

the Indians having only a right of occupancy,[46] and that the area would be embraced by a future state.

In *United States* v. *Holt State Bank* the Indian tribe was the grantor. The Government was the grantee. The Court noted[47] that when the Indian tribe made the cession to the Government: "There was no formal setting apart of what was not ceded . . ." The Court is there saying that the Chippewas were the grantors and had they wanted to keep the soil and the minerals underlying Mud Lake, they should have formally set them apart from their cession.

This Court in reviewing the treaties between the Chippewas and the United States did not find in *United States* v. *Holt State Bank:* ". . . anything evidencing a purpose to depart from the established policy, before stated, of treating such lands as held for the benefit of the future state."[48]

The *sine qua non* of Minnesota's ownership of the soil and minerals underlying Mud Lake are: *First*, the lands were not ceded by the United States to the Chippewas. The reverse was true. The Chippewas ceded the land to the United States without any reservation except the right of occupancy. *Second*, the Chippewas having ceded the lands to the United States prior to Minnesota becoming a State, the policy of treating lands underlying navigable waters for the benefit of future states became applicable.

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[46] The Court observed at 270 U.S. 58, 70 L.Ed. 470: "The effect of what was done was to reserve in a general way for the continued occupation of the Indians what remained of their aboriginal territory; and thus it came to be known and recognized as a reservation. Minnesota v. Hitchcock, 185 U.S. 373, 389, 46 L.Ed. 954, 963, 22 Sup.Ct. Rep. 650."

[47] First column, 70 L.Ed. 470.

[48] 270 U.S. 58, 70 L.Ed. 470.

But the absolute prerequisites to Oklahoma's ownership of the soil and minerals underlying the navigable portion of the Arkansas River within its borders are missing from the case at bar. For here without qualifying words the United States had conveyed to the Choctaws the fee simple title to their lands in what is now Oklahoma. And here the policy of retaining the bed of navigable streams in those lands for the benefit of a future State has no application because the United States had by treaty specifically guaranteed the Choctaws *"that no part of the lands granted to them shall ever be embraced in any Territory or State"* (Article IV of the Treaty of 1830).

Paraphrased to reflect the facts in the case at bar, *United States* v. *Holt State Bank* would have read:

> The United States was the grantor of the patent of 1842 conveying to the Choctaws without any qualifying words the fee simple title to their lands in what is now Oklahoma. *There was no formal setting apart of what was not ceded.* The guarantee given by the United States in its treaties with the Choctaws that no part of the lands granted to them shall ever be embraced in any Territory or State *evinced a purpose to depart from the established policy of treating such lands as held for the benefit of a future state.*

Had this Court been addressing itself to the facts in the case at bar it would have said in *United States* v. *Holt State Bank* that, as the Government was the grantor of the lands in what is now Oklahoma and the Choctaws were the grantees, and that it was not intended in either 1820 or 1830 that the lands should be embraced in a future State or Territory, if the Government had wanted to keep the

soil and the minerals underlying the navigable streams in those lands, it should have formally set them apart from its grant.

In effect the court below's construction of Northern Pacific Railway Company v. Soderberg, 188 U.S. 526, 534 and Caldwell v. United States, 250 U.S. 14, 20, vitiates Choctaw Nation v. United States, 119 U.S. 1, 27, 28, 31 L.Ed. 313, Jones v. Meehan, 117 U.S. 1, 10, 11, Choctaw Nation of Indians v. United States, 318 U.S. 423, 431, 432, 87 L.Ed. 877, 882, 883 and the stipulation in the last sentence of Article XVIII of the Treaty concluded at Dancing Rabbit Creek in 1830 that ". . . in the construction of this treaty wherever well-founded doubt shall arise, it shall be construed most favorably to the Choctaws."

In its opinion (Appendix, page xiv) the court below said: "We recognize that an Indian treaty is to be liberally construed in favor of the Indians as unlettered people understood it and as justice and reason demand when the strong assert power over those to whom they owe care and protection. Another rule of construction is that in a grant by the sovereign nothing passes by implication.", citing *Northern Pacific Railway Company* v. *Soderberg* and *Caldwell* v. *United States*. The court below then said: "*Holt State Bank* extends this rule to a situation relating to Indian lands and the equal footing-implied trust doctrine. Although *Holt State Bank* did not deal with a claim presented by Indians and although the United States is not a party to this case, we believe that the rule announced in that decision must apply. *It requires a plain and definite intent to convey the bed of navigable rivers which otherwise would pass to a state on admission.* * * * Nothing in

the treaties, statutes or conveyances establishes an intent by the United States, *as trustee for states to be formed,* to convey away property held for the benefit of the new states." (Emphasis supplied.)

The pith of the decision of the court below is that a construction of the treaties of 1820 and 1830 must be adopted which would have supported a claim of the United States to the soil and minerals underlying the navigable portion of the Arkansas River in the area ceded to the Choctaws if that claim had been asserted immediately after the signing of those treaties.

The court below thus placed this Court's decisions in *Northern Pacific Railway Company* v. *Soderberg* and *Caldwell* v. *United States, vis-a-vis* its decisions in *Choctaw Nation* v. *United States, Jones* v. *Meehan, Choctaw Nation of Indians* v. *United States, Winters* v. *U. S.*, 207 U.S. 564, 576, 577, *Worcester* v. *Georgia*, 6 Pet. 515, 582, 8 L.Ed. 483, 508, *Carpenter* v. *Shaw*, 280 U.S. 263.

Northern Pacific Railway Company v. *Soderberg* was a bill filed by the railway company to enjoin Soderberg from taking granite from land which he had taken possession under a mineral location and for an account of the granite quarried or removed. The railway company alleged its incorporation under the Act of July 2, 1864 (13 Stat. 365) and the grant to it by that Act of every alternate odd-numbered section of public land, not mineral, and to the amount of twenty alternate sections per mile on each side of the line when passing through the territories. The bill further alleged that the principal value of the land in dispute consisted of a ledge of granite; that in 1898 Soderberg

entered upon the land and began to quarry and remove the granite under a mineral location. Soderberg answered that the lands were mineral in character and as such excepted from the Act.

The construction of that grant was governed by the general rule—". . . that grants from the sovereign should receive a strict construction,—a construction which would support the claim of the government rather than that of the individual."

Caldwell v. *United States* was an action brought by Caldwell to recover the value of certain timber cut from the public lands of the United States in the State of Colorado[49] Caldwell based his right of recovery upon contracts with the Denver, Northwestern and Pacific Railway Company which had been given the right by the Act of Congress of March 3, 1875 (18 Stat. 482) to take from the public lands adjacent to its line, timber necessary for the construction of its railroad. Under contract with the railway company Caldwell moved from lands adjacent to the railroad approximately 88,000 ties and delivered them to the company. After the ties were moved a large amount of "tie slash" was left. Caldwell attempted to sell about 200 cars of "tie slashes" to the Frazier River Timber Company and to the Leyden Coal Company to be used as mining props. Officers of the Forest Service refused to allow Caldwell's transferees to have a large portion of the "tie slash" which they took possession of and sold, the proceeds being

[49] Called "tie slash" and "tie slashing," the term being used to describe the tops of trees, the bodies of which had been used for making railroad ties.

placed in the treasury of the United States. Caldwell then brought that action to recover the sums paid into the treasury of the United States claiming that there was no provision in the Act of March 3, 1875 for disposition of what remained of trees after portions of them had been used for making ties for railroad purposes. He argued that the railroad company was entitled to the "tie slash" as incident to its right to cut under the Act of Congress. This Court held that grants such as the one given by the Act of March 3, 1875 must be construed favorably to the Government; that nothing passed but what was conveyed in clear and explicit language—inferences being resolved not against but for the Government.

The facts in the case at bar are not faintly suggestive of those in *Northern Pacific Railroad Company* v. *Soderberg* or *Caldwell* v. *United States*. For the United States stipulated by the last sentence in Article XVII of the treaty concluded at Dancing Rabbit Creek in 1830 that:

> ". . . in the construction of this treaty wherever well founded doubt shall arise, it shall be construed most favorably towards the Choctaws."

This provision reflects the policies established by both the Government and the courts before the Treaty at Dancing Rabbit Creek and followed without exception since. Thus, we hear this Court saying in *Choctaw Nation* v. *United States*, 119 U.S. 1, 27, 28, 30 L.Ed. 315 (1886):

> "It had accordingly been said in the case of Worcester v. Georgia, 6 Peters, 582 (31 U.S. bk. 8, L.ed. 508): 'The language used in treaties with the Indians should never be construed to their prejudice. If words

be made use of which are susceptible of a more extended meaning than their plain import as connected with the tenor of the treaty, they should be considered as used only in the latter sense. * * * How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction.'

"The recognized relation between the parties to this controversy, therefore, is that between a superior and an inferior, whereby the latter is placed under the care and control of the former, and which, while it authorized the adoption on the part of the United States of such policy as their own public interests may dictate, recognizes, on the other hand, such an interpretation of their acts and promises as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection. The parties are not on an equal footing, and that inequality is to be made good by the superior justice which looks only to the substance of the right, without regard to technical rules, framed under a system of municipal jurisprudence, formulating the rights and obligations of private persons, equally subject to the same laws.

"The rules to be applied in the present case are those which govern public treaties, which, even in case of controversies between nations equally independent, are not to be read as rigidly as documents between private persons governed by a system of technical law, but in the light of that larger reason which constitutes the spirit of the law of nations. And it is the treaties made between the United States and the Choctaw Nation, holding such a relation, the assumptions of fact and of right which they presuppose, the acts and conduct of the parties under them. The rule of interpretation already stated, as arising out of the

nature and relation of the parties, is sanctioned and adopted by the express terms of the treaties themselves."

And again in 1943 in *Choctaw Nation of Indians* v. *United States*, 318 U.S. 423, 431, 432, 87 L.Ed. 877, 882, 883:

"Of course treaties are construed more liberally than private agreements, and to ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations and the practical construction adopted by the parties. Factor v. Laubenheimer, 280 US 276, 294, 295, 78 L.ed. 315, 324, 325, 54 S. Ct. 191, Cook v. United States, 288 US 102, 112, 77 L.ed. 641, 646, 53 S. Ct. 305. Especially is this true in interpreting treaties and agreements with the Indians; they are to be construed, so far as possible in the sense in which the Indians understood them, and 'In a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people.' Tulee v. Washington, 315 US 681, 684, 685, 86 L.ed. 1115, 1119, 1120, 62 S. Ct. 862. See also United States v. Shoshone Tribe, 304 US 111, 116, 82 L.ed. 306, 315, 7 S. Ct. 75."

In *Jones* v. *Meehan*, 175 U.S. 1, 10, 11, this Court said:

"In construing any treaty between the United States and an Indian tribe, it must always (as was pointed out by the counsel for the appellees) be borne in mind that the negotiations for the treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves; that the treaty is drawn up by them and in their own language; that

the Indians, on the other hand, are a weak and dependent people, who have no written language, and are wholly unfamiliar with all the forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States; and that the treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians."

The court below's construction of *Northern Pacific Railway Company* v. *Soderberg* and *Caldwell* v. *United States* vitiates the rule enunciated by this Court in *Choctaw Nation* v. *United States,* 119 U.S. 1; *Jones* v. *Meehan,* 117 U.S. 1; *Choctaw Nation of Indians* v. *U. S.,* 318 U.S. 423; *Worcester* v. *Georgia,* 6 Pet. 515; *Carpenter* v. *Shaw,* 280 U.S. 263, and the provisions in the treaty of September 27, 1830 with the Choctaws that ". . . in the construction of this treaty wherever well-founded doubt shall arise it shall be construed most favorably to the Choctaws."

The only possible reason the United States would have had for retaining the title to the beds of navigable streams within the lands ceded to the Choctaws would have been that it was reserving them in trust for future states. But when the Treaty at Doak's Stand of 1820 and the Treaty at Dancing Rabbit Creek of 1830 were entered into neither the United States nor the Choctaws intended that the lands ceded to the Choctaws should ever be embraced within a State. The United States, therefore, could not have had any intent to reserve from the grant of the treaties the soils and minerals underlying navigable portions of rivers within the land ceded to the Choctaws for the benefit of a future state.

In its briefs to the courts below the State excerpted a sentence from Article XI of the Treaty of 1830 which provided "navigable streams shall be free to the Choctaws who shall pay no higher toll or duties than citizens of the United States"[50] and said that this sentence was a clear indication that the United States was retaining the title to the bed of navigable streams within the areas ceded to the Choctaws. What the State did was to excerpt that sentence from Article XI and attempt to have it read out of context. The whole of Article XI reads:

> "Navigable streams shall be free to the Choctaws who shall pay no higher toll or duty than citizens of the United States. It is further agreed that the United States shall establish one or more post offices in said Nation, and may establish such military post roads, and posts as they may consider necessary."

It was in relation to this claim of the State that the Choctaws said in its briefs to the courts below that in view of the circumstances existing at the time the treaties with

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[50] A similar provision was found in many other Indian Treaties. In a Treaty with the Cherokees approved July 2, 1791, 7 Stat. 39, 2 Kappler 22, a Cherokee boundary was established in Article V of the Treaty which reads as follows:

> "It is stipulated and agreed, that the citizens and inhabitants of the United States, shall have a free and unmolested use of a road from Washington district to Mero district, and of the Tennessee river."

In a Treaty with the Six Nations of November 1794, 7 Stat. 44, 2 Kappler 28, lands were involved along Lake Ontario and Lake Erie. Article V of this treaty provides with reference to roads, rivers and harbors, as follows:

> "And the Six Nations, and each of them, will forever allow to the people of the United States, a free passage through their lands, and the free use of the harbors and rivers adjoining and within their respective tracts of land, for the passing and securing of ves-

the Choctaws were entered into and the objects which the Government and the Choctaws were desirous of effecting it is obvious that the Government had no need of anything but a navigation easement on the streams in the Choctaw lands and that it did not need to reserve the soil of the beds of navigable streams and the minerals underlying them in trust for a future state because at that time it was not intended that the area should ever become a part of any state. In its briefs to the courts below the Choctaws said that if that sentence posed an ambiguity then that ambiguity must be resolved most favorably to the Choctaws. The construction most favorable to the Choctaws is that by Article XI the United States retained only a navigation easement on the Arkansas River.

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sels and boats, and liberty to land their cargoes where necessary for their safety."

In a Treaty with the Sac and Foxes of November 3, 1804, 7 Stat. 84, 2 Kappler 54, the Indians gave the United States permission to establish a military post either on the upper side of the Ouisconsing or on the right bank of the Mississippi, and did further agree:

". . . that they will at all times allow to traders and other persons travelling through their country undtr the authority of the United States a free and safe passage for themselves and their property of every description. And that for such passage they shall at no time and on no account whatever be subject to any toll or exaction."

A Treaty with the Creeks, November 14, 1805, 7 Stat. 96, 2 Kappler, 62, reads as follows:

"And it is also agreed on the part of the Creek nation, that the navigation and fishery of the Ocmulgee, from its junction with the Oconee to the mouth of the Ulcofauhatchee, shall be free to the white people; provided they use no traps for taking fish; but nets and seines may be used, which shall be drawn to the easterly shore only."

By a Treaty with the Cherokees of March 22, 1816, 7 Stat. 139, 2 Kappler 87, the United States was granted the free use of certain

State v. Nolegs, 40 Okla. 479, 139 Pac. 943; Vickery v. Yahola Sand and Gravel, 158 Okla. 120, 12 P.2d 881; City of Tulsa v. Commissioners of the Land Office, 187 Okla. 82, 101 P.2d 246, and Lynch v. Clements (Okla.), 263 P.2d 153, all are predicated on the proposition that the bed of the navigable portions of the Arkansas ". . . was retained and held by the United States in trust for the future state and that upon admission of the State of Oklahoma to the Union in 1907, the title thereto vested and became the property of the State of Oklahoma."

There has never been a decision in any court of record concerning the ownership of the navigable portion of the Arkansas River in which either the Choctaw or Chickasaw Nations were parties. There has never been a decision by any court involving the ownership of the navigable portions of the bed of the Arkansas River in which the ownership of the Choctaw Nation or the effect of the Treaties at

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roads through the Cherokee nation for intercourse between the states of Tennessee and Georgia and Mississippi Territory. Article 2 of the treaty then went on to provide that:

". . . the citizens of the United States shall freely navigate and use, as a highway, all the rivers and waters within the Cherokee nation. The Cherokee nation further agree to establish and keep up, on the roads to be opened under the sanction of this article, such ferries and public houses as may be necessary for the accomodation of the citizens of the United States."

Article III of a Treaty of peace between the United States of America and the tribes of Indians, called the Wyandots, Delawares, Shawanoes, Ottawas, Chippewas, Putawatimes, Miamis, Eel-river, Weea's, Kickapoos, Piankashaws, and Kaskaskias, of August 3, 1795, 7 Stat. 49, 2 Kappler 30, reads:

"And the said Indian tribes will also allow to the people of the United States the free use of the harbors and mouths of rivers along the lakes adjoining the Indian lands, for sheltering vessels and boats, and liberty to land their cargoes where necessary for their safety."

Doak's Stand or Dancing Rabbit Creek on the ownership of the soil underlying the navigable portion of the Arkansas was raised or taken into consideration. This is the first forum in which the Choctaw and Chickasaw Nations have had an opportunity to be heard.

In 1914, the Supreme Court of Oklahoma had before it the case of *State* v. *Nolegs*, 40 Okla. 479, 139 Pac. 943, 945. There the State of Oklahoma brought an action to quiet title to an island in the Arkansas River against Nolegs, a member of the Osage Tribe of Indians. The Jim Crow Oil Company intervened.

The Oklahoma Court held that the ownership of the navigable water and soil under them and all of the territory embraced in the Lousiana Purchase was held in trust by the Federal Government for the benefit of future states, and, as each of the states was created, the same, within the boundary of such state, passed to it, and the absolute right to the navigable waters and the soil thereunder was in the State of Oklahoma. Apparently the decision of the court was influenced by an incident which occurred in March, 1908, in which the United States Indian Agency had been asked to enter into a contract for taking sand and gravel from the Arkansas within the limits of the Cherokee Nation. At that time there were other contracts for taking sand and gravel from the Arkansas. It was contended that after statehood neither the Cherokee Nation nor the Department of the Interior had further jurisdiction to the matter and that the contractors should no longer be required to pay them royalty for sand and gravel taken from the nevigable portion of the Arkansas. The acting

commissioner of Indian Affairs held that the warranty deeds, by virtue of which the sand and gravel was being removed, became void upon Oklahoma becoming a state because, as he said: "In other words, when the United States conveyed by warranty deed the lands occupied by Cherokees, Creeks, Choctaws, Chickasaws and Seminoles, it did not convey the bed of the navigable streams, but reserved them for the benefit of the future state within whose boundaries they would fall."

In the early 1930's, an action was commenced by one Vickery against the Yahola Sand and Gravel Company in which one of the issues was the ownership of the bed of the Arkansas. After an appeal was perfected to the Supreme Court of Oklahoma (158 Okla. 120, 12 P.2d 881) the State of Oklahoma *ex rel* the Commissioners of the Land Office intervened. In its opinion the court acknowledged the validity of the rule in *Shively* v. *Bowlby*[51] that Congress has the power to make grants of land below the high-water mark of navigable waters in any territory of the United States where it becomes necessary to do so in order to carry out the public purposes (second column of page 883). But then (the latter part of first column of page 885) the court reasoned that it would be far better for the Cherokees ". . . that the title to the navigable portions of the Arkansas be kept and held in the United States for the ultimate use and benefit of the future state, if and when, by the consent of the Cherokee Tribe, a state should be erected embracing the land so granted to them."

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[51] 152 U.S. 1.

And so following these precedents the Supreme Court of Oklahoma said in *City of Tulsa* v. *Commissioners of the Land Office*, 187 Okla. 82, 101 P.2d 246, 248:

> "It was settled long ago that the ownership of the navigable waters and the soil under them in all the Territory embraced in the Louisiana Purchase was held in trust by the Federal Government, and as each of the states was created, such ownership within the boundaries of such state passed, to it, and the absolute right to the soil under such waters is in the state subject to the public rights and the paramount power of Congress over navigation, and that such ownership extends to the high water mark."

In *Lynch* v. *Clements* (Okla.), 263 P.2d 153, the Court cites its decision in *Vickery* v. *Yahola Sand and Gravel Co.*[52]

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[52] *United States* v. *Brewer-Elliott Oil and Gas Co.*, in the District Court for the Western District of Oklahoma, 249 Fed. 609, 610, affirmed by the United States Circuit Court of Appeals, *Brewer-Elliott Oil and Gas Co.* v. *United States*, 270 Fed. 100 and this Court 260 U.S. 77, 43 S.Ct. 60, 67 L.Ed. 140, the issue of the navigability of the Arkansas River within Oklahoma was the issue. In the body of the opinion of the Circuit Court of Appeals, Judge Sanborn speaking for the court, said: "The theory of counsel for the state is that, if this river is navigable, the United States held the title to the bed of the river below high-water mark until the admission of Oklahoma into the Union in 1907, when that title vested in the state, but that, if it was not navigable, the title to the bed in controversy vested in the Osage Tribe. This theory ignores the grave question whether or not the United States did not by the treaties and grants to which reference has been made vest in the Cherokee Nation in 1938, and thereafter in the Osage Tribe, its successor in interest, the title to this property even if the river was navigable. *Shively* v. *Bowlby*, 152 U.S. 1, 48, 58, 14 S.Ct. 548, 38 L.Ed. 331; *Alaska Pac. Fisheries* v. *U. S.*, 248 U.S. 78, 87, 90, 39 S.Ct. 40, 63 L.Ed. 138; *U. S.* v. *Roamine, et al.*, 255 Fed. 253, 260, 166 C.C.A. 423, 430; *Knight* v. *U. S. Land Assoc.*, 142 U.S. 161, 183, 184, 12 S.Ct. 258, 35 L.Ed. 974."

The thesis that references to the Arkansas River in the Treaties of 1820 and 1830 are for the purpose of establishing reference points, monuments or boundaries is tenable only if by those treaties the United States intended to retain the ownership of the navigable portion of the Arkansas River in trust for a future state.

By Article II of the treaty concluded at Doak's Stand on October 18, 1820, the United States ceded to the Choctaws a tract of land bounded as follows: "—beginning on the Arkansas River, where the lower boundary line of the Cherokee strikes the same; thence up the Arkansas to the Canadian Fork, and up the same to its source; thence due south to the Red River; thence down Red River three miles below the mouth of Little River which empties into Red River on the north side; thence a direct line to the beginning."[53]

In its opinion (Appendix, page xiii) the court below said: "We agree with Oklahoma that references to the Arkansas River are for the purpose of establishing reference points, monuments or boundaries. They do not indicate an intent, much less a clear intent, to convey the riverbed."

It is respectfully submitted that this conclusion of the court below is at sixes and sevens with the well established rule that where the United States owns the bed of a nonnavigable stream and the upland of one or both sides, it is free when disposing of the upland to retain all or any part of the riverbed; and whether, in any particular instance, it has done so, is essentially a question of what is

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[53] 7 Stat. 210, Proclamation, January 8, 1821.

intended. If its intention is not otherwise shown it will be taken to have assented that its conveyance of the upland operate as a conveyance of the riverbed. *United States* v. *Arizona*, 295 U.S. 1, 79 L.Ed. 1267, 55 Sup. Ct. 610; *Wilcox* v. *Jackson*, 13 Pet. 498, 516, 517, 10 L.Ed. 264, 273; *Irvine* v. *Marshall*, 20 How. 558, 15 L.Ed. 994; *Gibson* v. *Chouteau*, 13 Wall. 92, 99, 20 L.Ed. 534, 536; *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 404, 61 L.Ed. 791, 816, 37 Sup. Ct. Rep. 387; *Kean* v. *Caulment Canal & Improv. Co.*, 190 U.S. 452, 460, 47 L.Ed. 1134, 1137, 23 Sup. Ct. Rep. 651; *Hardin* v. *Jordan*, 140 U.S. 371, 384, 35 L.Ed. 428, 434, 11 Sup. Ct. Rep. 808, 838; *Mitchell* v. *Smale*, 140 U.S. 406, 413, 414, 35 L.Ed. 442, 445, 11 Sup. Ct. Rep. 819, 840; *Grand Rapids & I.R. Co.* v. *Butler*, 159 U.S. 87, 92, 40 L.Ed. 85, 87, 15 Sup. Ct. Rep. 991; *Hardin* v. *Shedd*, 190 U.S. 508, 519, 47 L.Ed. 1156, 1157, 23 Sup. Ct. Rep. 685; *Whitaker* v. *McBride*, 197 U.S. 510, 512, 515, 516, 49 L.Ed. 857, 860-862, 25 Sup. Ct. Rep. 530; and see *St. Paul & P. R. Co.* v. *Schurmeir*, 7 Wall. 272, 287, *et seq.*, 19 L.Ed. 74, 78.

It would be a curious thing indeed to construe the term "up the Arkansas" to mean "up the south bank of the Arkansas to the point where it becomes non-navigable and from that point up the north bank." Such a thesis could only be sustained if the United States and the Choctaws had agreed by the treaties of 1820 and 1830 that the territories conveyed to the Choctaws were to become embraced in a future state in which event of course the bed of the navigable portion of the Arkansas would then have been held by the United States in trust for the benefit of the future state. Since it is plainly evident that it was not the intent of the United States and the Choctaws at the

time they made the treaties of 1820 and 1830 that the lands ceded to the Choctaws should become a part of a state that thesis is not tenable.

Where Congress has granted lands underlying navigable waters by way of carrying out public purposes appropriate to the objects for which the territory was held such rights are not cut off by the subsequent creation of a state but remain unimpaired and the rights which otherwise would pass to the state in virtue of its admission to the Union are restricted or qualified accordingly.

This Court said in *Holt State Bank:*

"It is settled law in this country that lands underlying navigable waters within a state belong to the state in its sovereign capacity and may be used and disposed of as it may elect, subject to the paramount power of Congress to control such waters for the purposes of navigation in commerce among the states and with foreign nations, and subject to the qualification that where the United States, after acquiring the territory and before the creation of the state, has granted rights in such lands by way of performing international obligations, or effecting the use or improvement of the lands for the purposes of commerce among the states and with foreign nations, or carrying out other public purposes appropriate to the objects for which the territory was held, such rights are not cut off by the subsequent creation of the state, but remain unimpaired, and the rights which otherwise would pass to the state in virtue of its admission into the Union are restricted or qualified accordingly. Barney v. Keokuk, 94 U. S. 324, 338, 24 L.ed. 224, 228; Shively v. Bowlby, 152 U. S. 1, 47, 48, 57, 58, 38 L.ed. 331, 348, 349, 352, 14 Sup. Ct. Rep. 548; Scott v. Lattig, 227 U. S. 229, 242, 57 L.ed. 490, 496, 44 L.R.A. (N. S.) 107, 33 Sup. Ct. Rep. 242; Seattle v. Oregon & W.R. Co., 255

U. S. 56, 63, 65 L.ed. 500, 506, 41 Sup. Ct. Rep. 237; Brewer-Elliott Oil & Gas Co. v. United States, 260 U. S. 77, 83-85, 67 L.ed. 140, 144, 145, 43 Sup. Ct. Rep. 60."

The court below said:[54] "From a practical standpoint the equal footing principle must be recognized and maintained. There is no place in our federal system for a second class state." Unquestionably the conclusion of the court below makes the "equal footing" doctrine so inelastic that it would not admit of any exceptions. But the court below's conclusion is inconsonant with its acknowledgment[55] of the exceptions to the "equal footing" doctrine reflected in *Moore* v. *United States* (9 Cir.), 157 F.2d 760, *cert.*, 330 U.S. 827, and in *United States* v. *Stotts* (W.D. Wash.), 49 F.2d 619, and of the several exceptions this Court cites in support of the rule so clearly and distinctly enunciated by it in *United States* v. *Holt State Bank*.

Neither the Atoka Agreement nor the Curtis Act effected a retrocession of the soil and minerals underlying the navigable portion of the Arkansas River to the United States.

In its opinion (Appendix, pages vi, vii) the court below relates the creation of a commission in 1893 to negotiate with the Choctaws and other tribes for the allottment in severalty of the tribal lands to individual members of the tribe. The court below said that the result of these negotiations was an agreement with the Choctaws ". . . which nullified treaties inconsistent therewith and which provided for the allotment of the lands." Later at pages

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[54] Appendix, page x.

[55] Appendix, page xiv.

x and xi of the Appendix, the court below discussed the provision of the Treaty at Dancing Rabbit Creek that the area ceded to the Choctaws would never be embraced by a State or Territory. The court said that it believed such provisions had to do with the exercise of political power rather than with property rights and that "the political aspects were changed by the Indians' acceptance of the nullification of the treaties." But the court goes on to say in the following sentence that the property rights were unaffected by either the recognition or the nullification of the treaty provisions concerned with the creation of state or territorial governments.

This author must frankly confess that he does not understand what the court below was aiming at by that language but if it should be said that by that language the court below was holding that the Atoka Agreement and the Curtis Act (30 Stat. 495) effected a retrocession of the soil and the minerals underlying the navigable portion of the Arkansas River in Oklahoma, the Choctaws reply that nothing can be found in either the Atoka Agreement or the Curtis Act which would directly or indirectly or proximately or remotely support such a conclusion. Indeed the first proviso to Section 11 of the Curtis Act says:

> "Provided, That, nothing herein contained shall in any way affect any vested legal rights which may have been heretofore granted by Act of Congress, nor be so construed as to cover any additional rights upon any parties claiming under any such Act of Congress."

The Choctaws would say further that at page x of the Appendix the court below stated the single issue on which its decision centered:

"Title to the riverbed in question passed to Oklahoma on admission unless prior thereto Congress disposed of federal title for a public purpose by an action showing a clear intent to make such divestiture. Such intent is not definitely declared in the grant. The question is whether the surrounding circumstances make that intent 'very plain.'"

Obviously the court below did not intend to hold that the Atoka Agreement or the Curtis Act effected a retrocession of the soil and minerals underlying the navigable portion of the Arkansas River in Oklahoma to the United States.

CONCLUSION

The removal of the Indians from the southern states to the lands west of the Mississippi was a purpose appropriate to the objects for which the United States held the territory. General Clark, General Thomas and General Hinds, who, as commissioners for the United States negotiating for the removal of the Choctaws from Mississippi, demonstrated the appropriateness of that purpose when they said to them in an address at the treaty ground of the Choctaw Nation in 1826: "The United States have a large unsettled and unappropriated country on the west side of the great river Mississippi, into which they do not intend that their white settlers shall extend. This is the country in which our father the President intends to settle all of his Red children."

The "Indian Removal Act" of May 28, 1830, making it ". . . lawful for the President of the United States to cause so many of any territory belonging to the United

States, west of the river Mississippi, not included in any State or organized territory, and to which the Indian title has been extinguished, as he may judge necessary, to be divided unto a suitable number of districts, for the reception of such tribes of Nations of Indians as may choose to exchange the lands where they now reside and remove there . . ." was a proper method through which the United States accomplished a purpose appropriate to the object for which it held the territories.

It is settled law that Congress has the power to make grants of land below the high water mark of navigable rivers in any territory of the United States to carry out public purposes appropriate to the objects for which the United States held the territory (*Brewer-Elliott Oil and Gas Co.* v. *United States,* 260 U.S. 77, 84). It is equally well settled that where the United States, after acquiring the territory and before the creation of the State, has granted rights in such lands for the purpose of carrying out purposes appropriate to which the objects for which the territory was held, such rights are not cut off by the subsequent creation of a State, but remain unimpaired, and the rights which otherwise would have passed to the State by virtue of its admission into the Union are restricted and qualified accordingly. (*United States* v. *Holt State Bank,* 270 U.S. 49, 54, 55, 70 L.Ed. 465, 468.)

John C. Calhoun's pledge to the Choctaw delegation in Washington in 1824 "There is no probability that any State or territory will be erected to the west of the Arkansas territory;" the provision in the Treaty of 1825 establishing the western boundary line of the present State of Arkan-

sas by which the United States covenanted that it would "prevent future settlements from being made on the west thereof;" the pledge of the United States given to the Choctaws through its commissioners, General Clark, General Hinds, and General Coffee in 1826 that there the United States would "guard you against all enemies, whether they be white or red; and no State or territory will be created;" the promise of the President, Andrew Jackson, to the Chickasaws at Franklin, Tennessee, on August 23, 1830, that "The United States would give them a grant for lands which should endure as long as the grass grows and the water runs" and "within your limits no State or Territorial authority will be permitted;" the assurance that Secretary Eaton and General Coffee gave to the Choctaws at Dancing Rabbit Creek in Mississippi on September 18, 1830, that "there your great Father can be your friend; and he can keep the white man's law from interrupting and disturbing you; and there, too, he will guard you against all enemies whether they be white or red. There no State or Territory will be created;" and the solemn declaration of the United States in Article IV of the Treaty of September 28, 1830, "That no part of the lands granted to them shall ever be embraced in any territory or State" leaves no room for it to be said that when the United States signed the treaties with the Choctaws it intended that the lands conveyed to the Choctaws would be embraced in a state or that it intended to reserve the soil and the minerals under the bed of the navigable portion of the Arkansas for the benefit of a future state.

For the foregoing reasons it is respectfully submitted that this petition for certiorari should be granted.

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January, 1969

APPENDIX

FILED
United States Court of Appeals
Tenth Circuit
OCT 31 1968
William L. Whittaker
Clerk

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 9924 & 9925 — SEPTEMBER TERM, 1968

THE CHEROKEE NATION or Tribe of Indians in Oklahoma, THE CHOCTAW NATION and THE CHICKASAW NATION,
Appellants,

v.

STATE OF OKLAHOMA; COMMISSIONERS OF THE LAND OFFICE OF THE STATE OF OKLAHOMA; CITIES SERVICE OIL CO.; CONTINENTAL OIL CO.; EASON OIL CO.; STEVE GOSE; JAKE L. HAMON; HUMBLE OIL AND REFINING CO.; JEFFREY SAND AND GRAVEL CO.; LONE STAR PRODUCTION CO.; MARATHON OIL CO.; MOBIL OIL CORPORATION; PAN AMERICAN PETROLEUM CORPORATION; SKELLY OIL CO.; SOUTHLAND ROYALTY CO.; STEPHENS PRODUCTION CO.; SUN OIL CO.; TENNECO OIL CO.; UNION OIL CO. OF CALIFORNIA; and YAHOLA SAND AND GRAVEL CO., a Corporation,
Appellees.

Appeal from the United States District Court
for the Eastern District of Oklahoma

[APPENDIX]

Earl Boyd Pierce for Appellant The Cherokee Nation. With him on the brief were Joseph Muskrat, Andrew C. Wilcoxen and Jesse L. Ballard.

Lon Kile for Appellants The Choctaw Nation and The Chickasaw Nation.

M. Darwin Kirk for the Appellees. With him on the brief were:

G. T. Blankenship, Attorney General, for the State of Oklahoma;

N. A. Gibson for Commissioners of the Land Office of the State of Oklahoma;

Jay R. Bond and Ross, Holtzendorff & Bond for Eason Oil Company;

Varley H. Taylor for Humble Oil & Refining Co.;

Robert W. Richards and S. M. Groom, Jr., for Mobil Oil Corporation;

Judson S. Woodruff, McAfee, Dudley, Taft, Gates & Mark and S. W. Wells for Skelly Oil Company;

H. B. Watson, Jr., and Walker & Watson for Union Oil Company of California and Steve Gose;

Frederic Dorwart and Holliman, Langholz & Runnels for Lone Star Producing Co.;

David O. Cordell, Eugene A. Hoefling, Riley B. Fell and Oscar L. Hasty for Marathon Oil Company;

Glenn R. Davis, Boesche, McDermott & Eskridge and Millard F. Carr for Tenneco Oil Company;

Dale Hinson, Robert L. Trimble and Hudson, Keltner, Smith & Cunningham for Southland Royalty Company;

W. Douglas Weisbruch for Lone Star Producing Co.

Roger P. Marquis for Amicus Curiae the United States. With him on the brief were Clyde O. Martz, Assistant At-

torney General, and Frank B. Friedman, Attorney, Department of Justice.

Alpheus Varner for Amici Curiae Robert G. Carter, B. E. Cobb and Katherine Cobb Baker.

Before LEWIS, BREITENSTEIN and HICKEY, Circuit Judges.

BREITENSTEIN, Circuit Judge.

This controversy concerns the ownership of the bed of the Arkansas River between its confluence with the Grand River[1] and the Oklahoma-Arkansas boundary. The Cherokees, Choctaws, and Chickasaws claim under deeds for vast areas executed by the United States. Oklahoma says that under the equal footing-implied trust doctrine it received title to the beds of navigable streams upon its admission to the Union. The trial court's decision in favor of Oklahoma was made, without an evidentiary hearing, on the pleadings and matters of which it could take judicial notice. No party contends seriously that any evidence is needed or helpful.

The Cherokees sued Oklahoma and the holders of various sand, gravel, oil, and gas leases granted by Oklahoma and covering parts of the land in dispute. The relief sought was an accounting and an injunction. Oklahoma and various of its lessees counterclaimed for a decree quieting title in Oklahoma. The Choctaws and Chickasaws were permitted to intervene and assert their claims of ownership to a portion of the riverbed.[2]

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[1] Sometimes known as the Neosho River and as the Neosho-Grand River.

[2] This is a joint claim. It is undisputed that the Choctaws have an undivided three-fourths interest and the Chickasaws an undivided one-fourth interest. See 11 Stat. 573; 11 Stat. 611; and Chickasaw Nation v. United States, 94 Ct.Cl. 215, 237. Hereinafter reference will be made only to the Choctaws.

All parties agree that the stretch of the Arkansas River with which we are concerned is navigable in fact.[3] From the mouth of the Grand to the confluence with the Canadian, the Arkansas flows through an area granted to the Cherokees. From the mouth of the Canadian to the state boundary, the river divides the lands of the Cherokees, which lie to the north, from the lands of the Choctaws, which lie to the south. The Choctaws claim that their title goes to the north bank of the Arkansas and the Cherokees dispute this. We find it unnecessary to consider this controversy between the Tribes.

The Tribes assert owership by reason of deeds from the United States covering vast, undivided areas, the perimeters of which were described by metes and bounds. The deeds did not except the beds of navigable streams. The basic argument is that, as a simple matter of conveyancing law, title to all lands within the area vested in the Tribes. An understanding of the situation requires consideration of the circumstances in which the deeds were issued.

At the time of the independence of the United States, the Tribes occupied large areas of land in the South. Westward expansion caused increasing friction between the white settlers and the Indians. Georgia and other later formed states asserted jurisdiction over the Indians and their lands. Intolerable situations arose.[4] The states ignored efforts by the United States to protect and provide for the Indians through treaty and statute. The federal government, faced with growing strife among the Indians and

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[3] In Brewer-Elliott Oil & Gas Co. v. United States, 260 U.S. 77, 86, the Supreme Court upheld a lower court finding that the head of navigation on the Arkansas was the mouth of the Grand.

[4] Descriptions of the condition of the Indians are found in Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1; Worcester v. Georgia, 31 U.S. (6 Pet.) 515; and Choctaw Nation v. United States, 119 U.S. 1.

the states, adopted the policy of resettling the Indians on lands to the west which were not then settled by whites.

The Cherokees were first given lands near the White River in what is now the State of Arkansas.[5] Emigration was slow, and new treaties were made, providing for resettlement of all the Cherokees on land west of the Mississippi to be deeded to the Indians by the United States. In turn, the Indians surrendered their lands east of the Mississippi.[6] The Cherokees were then moved to the new lands, but the voluntariness of their migration, and of their consent to the treaties, is doubtful.

The story of the Choctaws is much the same. Relocation of that Tribe from areas east of the Mississippi was made pursuant to the Treaty of Doak's Stand, October 18, 1820, 7 Stat. 210, and the Treaty of Dancing Rabbit Creek, September 27, 1830, 7 Stat. 333. The Choctaws gave up their lands in the East and received lands in the West.

The relocation of the Indians was made possible by the Louisiana Purchase of 1803,[7] in which the United States obtained the major portion of the western basin of the Mississippi River with the express intent that the inhabitants of the region "shall be incorporated in the Union of the United States."[8] Prior to relocation, however, the Cherokees and Choctaws desired protection from harassment by state and territorial governments. To induce them to move across the Mississippi, the United States agreed in the Treaty of New Echota and in the Treaty of Dancing Rabbit Creek that no part of the land granted would be

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[5] See Treaty of July 8, 1817, 7 Stat. 156, 158.

[6] See Treaty of May 6, 1828, 7 Stat. 311; Treaty of February 14, 1833, 7 Stat. 414; and Treaty of New Echota, December 29, 1835, 7 Stat. 478.

[7] Treaty of April 30, 1803, 8 Stat. 200.

[8] Id. at 202.

included in any state or territory.[9] The patents issued to the Cherokees and to the Choctaws contained no exception or reservation relating to the beds of navigable streams. The lands granted were described by their exterior boundaries.

In the years that followed the situation of the Indians deteriorated.[10] New territories were created in the West and new states admitted into the Union. A number of these states were in regions where Indian treaties provided that no state or territory should be created.[11] The existence of an extensive area which was held by the Indians and in which private property was not recognized was a serious obstacle to the creation of the State of Oklahoma.[12] In 1893, Congress created a commission to negotiate with the Cherokees, the Choctaws, and other tribes for the extinguishment of the tribal titles to land,[13] and the allotment of land to the individual members of the tribes. The result was an agreement with the Cherokees[14] and with the Choctaws[15] which nullified treaties inconsistent therewith and

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[9] The Treaty of New Echota provided (Art. 5, 7 Stat. 478, 481) that the lands ceded "shall, in no future time without their [the Indians'] consent, be included within the territorial limits or jurisdiction of any State or Territory." The Treaty of Dancing Rabbit Creek provided (Art. IV, 7 Stat. 333, 334) that "no part of the land granted them [the Indians] shall ever be embraced in any Territory or State."

[10] Stephens v. Cherokee Nation, 174 U.S. 445, 450-460, contains an account of conditions existing in the tribal governments and mentions their corruption and irresponsibility.

[11] See e.g. Treaty with the Senecas and Shawnees of July 20, 1831, 7 Stat. 351, 353; Treaty with the Shawnee of August 8, 1831, 7 Stat. 355, 357; and Treaty with the Ottaway of August 30, 1831, 7 Stat. 359, 361.

[12] Choate v. Trapp, 224 U.S. 665, 667.

[13] 27 Stat. 612, 645.

[14] 32 Stat. 716, 727.

[15] 32 Stat. 641, 656.

which provided for the allotment of the lands. These agreements were followed by the Act of April 26, 1906, 34 Stat. 137, which provided for final disposition of the affairs of the Five Civilized Tribes.[16] This Act required that lands belonging to the tribes on their dissolution shall be held by the United States in trust for the use and benefit of the Indians.[17]

Oklahoma was admitted into the Union in 1907 upon compliance with the conditions of the Enabling Act[18] which provided that Oklahoma should be so admitted "on an equal footing with the original States,"[19] and on the agreement that it disclaim title "to all lands * * * owned or held by any Indian or Indian Tribes."[20] By statute[21] and by court decision[22] Oklahoma has consistently maintained the position that it owns the beds underlying navigable streams. The present suit which questions that ownership was brought by the Cherokees nearly sixty years after statehood.

In Pollard v. Hagan, 44 U.S. (3 How.) 212, 230, the Court held that the Constitution did not pass title of the beds of navigable waters to the United States, but reserved title to the several states. Because new states enter the Union on an equal footing with all other states, title to

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16 These included the Chickasaws, Creeks, and Seminoles in addition to the Cherokees and the Choctaws.

17 34 Stat. at 148.

18 Act of June 16, 1906, 34 Stat. 267.

19 Id. at 271.

20 Id. at 279.

21 See 64 Okl.St.Ann. § 290; 60 Okl.St.Ann. § 337.

22 State v. Nolegs, 40 Okl. 479, 139 Pac. 943; Vickery v. Yahola Sand & Gravel Co., 158 Okl. 120, 12 P.2d 881; City of Tulsa v. Commissioners of Land Office, 187 Okl. 82, 101 P.2d 246; and Lynch v. Clements (Okl.), 263 P.2d 153.

the beds underlying navigable waters passes to the new states.[23] Shively v. Bowlby, 152 U.S. 1, 48, establishes the power of Congress to grant land below navigable water in a territory when it is necessary "to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce * * *, or to carry out other public purposes appropriate to the objects for which the United States hold the Territory." The decision in United States v. Holt State Bank, 270 U.S. 49, 55, recognizes the rule stated in Shively v. Bowlby and adds that the United States has refrained from making such dispositions except "in exceptional circumstances" and that disposals during the territorial period "are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain."

The parties recognize the principles just stated except that the Indians and those who support them question the applicability of the Holt State Bank decision because of distinguishing facts. Before Minnesota became a state in 1858, the Chippewas ceded to the United States their aboriginal right of occupancy with the reservation of an area for continued occupation. Included therein was Mud Lake which the Court found to be navigable water. Later the Indians relinquished the area to the United States. The issue was whether the United States held title to the land on which Mud Lake was located. The Court held that the lands under the lake were not disposed of by the United States before Minnesota became a state and title passed to Minnesota on admission. Although Holt State Bank was not concerned with a situation, such as we have here, involving a conveyance by the United States to the Indians, that case and the one at bar each relate to the question of whether the United States had disposed of lands under-

[23] See Mumford v. Wardwell, 73 U.S. (6 Wall.) 423, 436, and Weber v. Board of Harbor Commissioners, 85 U.S. (18 Wall.) 57, 65.

lying navigable waters before statehood. We must follow the admonition in Holt State Bank that such dispositions should not be regarded as intended in the absence of a clear showing of intent.

The United States, as amicus,[24] argues that the equal footing-implied trust doctrine has no application because of the unique character of the Cherokee and Choctaw territory under the treaties and cites Atlantic and Pacific Railroad Company v. Mingus, 165 U.S. 413, as supporting authority. In that case the issue was the validity of an act forfeiting a part of a railroad land grant. A claim of the railroad was that the forfeiture failed because the United States had not carried out its part of the bargain to extinguish certain Indian titles. The Court mentioned the Treaties of New Echota and Dancing Rabbit Creek and said that the extinguishment of the Indian title was for determination by Congress or by the executive officers of the federal government, or by voluntary acts of the Indians. Id. at 437-438. The Court quoted with approval the statement in Mackey v. Coxe, 59 U.S. (18 How.) 100, 103, that the Cherokee territory "is not a foreign, but a domestic territory—a Territory which originated under our Constitution and laws."

The treaties with the Indians are not in the same category with treaties with independent foreign nations. The Supreme Court early held that English possessions in America were claimed by right of discovery rather than by right of conquest and that under international law the Indians were regarded as temporary occupiers of the soil which was disposable by the Crown.[25] The title of the

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[24] The United States disclaims any pecuniary interest in the outcome of the cases and says that it submits its views because of "its non-pecuniary obligations to represent certain Indian interests."

[25] See Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 595, and Martin v. Waddell, 41 U.S. (16 Pet.) 367, 409.

Crown passed to the United States and the Indian lands were subject to disposition under the Constitution and laws of the United States. The agreements with the Indians, when ratified by Congress, became statutes of the United States. When grants were made to the Indians, the area granted remained under the jurisdiction of the United States and subject to its Constitution and laws.

In spite of provisions in Indian agreements that no state or territory would be created in certain areas,[26] states were created in the Northwest Territory and in the area covered by the Louisiana Purchase. In the situations before us, the Cherokees and Choctaws agreed to a nullification of the Treaties of New Echota and Dancing Rabbit Creek.[27] Oklahoma was admitted to the Union on an equal footing with the original states. From a practical standpoint, the equal footing principle must be recognized and maintained. There is no place in our federal system for a second-class state.

Title to the riverbed in question passed to Oklahoma on admission unless prior thereto Congress disposed of the federal title for a public purpose by an action showing a clear intent to make such divestiture. Such intent is not definitely declared in the grant. The question is whether the surrounding circumstances make that intent "very plain."[28]

The intent is said to be established by the agreement of the United States that no state or territory would be created in the area granted. The acceptance of this position would have widespread implications because, as we have seen, other states were created in areas covered by Indian treaties having similar provisions to those found in the

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[26] See footnote 11.

[27] See footnotes 14 and 15.

[28] United States v. Holt State Bank, 270 U.S. 49, 55.

Treaties of New Echota and Dancing Rabbit Creek. We believe that such provisions had to do with the exercise of political power rather than with property rights. The political aspects were changed by the Indians' acceptance of the nullification of the treaties. The property rights were unaffected by either the recognition or the nullification of the treaty provisions concerned with the creation of state or territorial governments.

The Indians point out that the ownership of the riverbed is not necessary to the exercise of control over navigation incidental to the authority of the Government under the Commerce Clause. This proves nothing. We are concerned with a property right—not with a navigational right. The recognition in the treaties of the constitutional powers of the United States,[29] if it has any effect at all, negatives intent to convey the riverbed.

Pursuant to their agreements with the United States, the Indians surrendered the areas which they occupied in the South. They reason that because they gave up the beds of navigable rivers, the United States intended that they should have such riverbeds in the areas to which they were removed; and conversely they say that if they do not own the Oklahoma riverbeds, they still own the beds of the navigable rivers in the territory from which they were removed. The reasoning is unpersuasive. The Indians had an aboriginal title which was subject to the Constitution and laws of the United States. Failure to mention riverbeds does not establish an intent either to retain or relinquish title. If anything, it shows that no party had the problem in mind.

Amici Carter, et al., argue that no contemporary intent of Congress to reserve the riverbeds can be postulated because under the then existing law the concept of navi-

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[29] See Treaty of New Echota, Art. 5, 7 Stat. 478, 481, and Treaty of Dancing Rabbit Creek, Art. IV, 7 Stat. 333, 334.

gability was limited to waters affected by the rise and fall of the tides and the Arkansas was not so affected. The Supreme Court has rejected as inapplicable to this country, the English rule that the test for navigability is the ebb and flow of the tides.[30] The recognition in 1832 by Kent of the English rule[31] preceded any decision by the Supreme Court on the issue and may not be taken as authoritative or persuasive. Reliance on the January 19, 1816, act of the Missouri Territorial Legislature[32] is misplaced because it adopted the common law of England except to the extent that it was not of a "local nature" and "not repugnant to, nor inconsistent with the constitution and laws of the United States." The Supreme Court has said that the ebb and flow of the tide test is not applicable to conditions in the United States. Jones v. Soulard, 65 U.S. (24 How.) 41, deals with the ownership of accretions and is not in point.

The application of the navigability principle announced in The Daniel Ball and in Barney v. Keokuk, supra, to the situation presented does not violate any rule of stare decisis. We recognize the importance of stare decisis to decisions affecting property rights.[33] There is no showing that any federal court has ever applied the tidewater rule in determining the ownership of land underlying navigable water and, particularly, there is no factual basis for any

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[30] The Daniel Ball, 77 U.S. (10 Wall.) 557, 563, and Barney v. Keokuk, 94 U.S. 324, 336. The reason is that in England all navigable rivers are affected by the tide whereas in the United States that condition is not present.

[31] See Commentaries on American Law by James Kent, 2d ed., Vol. III, p. 427.

[32] The pertinent area was then in the Territory of Missouri.

[33] In this regard the amici Carter, et al., rely heavily on the statements in The Propeller Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443, 458, that in overruling The Steam-Boat Thomas Jefferson, 23 U.S. (10 Wheat.) 428, it was not concerned with property rights. These cases dealt with admiralty jurisdiction and have no pertinence here.

claim that the Cherokees or Choctaws ever relied on that rule to their detriment.[34]

United States v. Rands, 389 U.S. 121, is no help to the Indians. That decision recognized the dominant navigational servitude held by the United States and rejected the claim that the United States must pay compensation for land's special value as a port site. It was not concerned with the ownership of a riverbed. It does not overrule Mumford v. Wardwell, 73 U.S. (6 Wall.) 423, 436, which says that the soils underlying navigable water "were not granted by the Constitution to the United States, but were reserved to the several States."[35] We find nothing in the law as it was at the times of the treaties which can be taken as indicative of an intent by the United States to pass title to the riverbed of the Arkansas to the Indians.

The Indians seek comfort from the technical language of the treaties and grants. They attach significance to such phrases as "to the Arkansas River," "down the Arkansas," and "thence down the main channel of the Arkansas." We agree with Oklahoma that references to the Arkansas River are for the purpose of establishing reference points, monuments, or boundaries. They do not indicate an intent, much less a clear intent, to convey the riverbed. Reliance on the surveys is misplaced. The surveyors could not determine the intent of the United States. Donnelly v. United States, 228 U.S. 243, is not in point. Prior to the creation of the reservation there in question, California, by an act of its legislature, had excluded the Klamath River from the navi-

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[34] In Shively v. Bowlby, supra, the Court applied the American rule in deciding the ownership of the Columbia River upon Oregon's entrance to the Union in 1859. In the Holt State Bank case, supra, the Court applied the same rule to the ownership of Mud Lake when Minnesota became a state in 1858.

[35] In United States v. Holt State Bank, 270 U.S. 49, 55, the Court said that "the United States early adopted and constantly has adhered to" the implied trust doctrine regarding lands under navigable waters.

gable class and the Court said that accordingly the river was not navigable in law. Id. at 262-263.

In Moore v. United States, 9 Cir., 157 F.2d 760, cert. denied 330 U.S. 827, and in United States v. Stotts, W.D. Wash., 49 F.2d 619, it was held that lands above low-water mark in tidal areas passed to Indians under treaties with the United States. In each case the court found a definite intent on the part of the United States to retain those lands and waters for the benefit of Indian fisheries and distinguished Holt State Bank, supra, on this ground. In the case before us we have no showing of any need by the Indians for the riverbed of the Arkansas and no expression of intent that it should pass to the Indians.

We recognize that an Indian treaty is to be liberally construed in favor of the Indians[36] as unlettered people understood it and as justice and reason demand when the strong assert power over those to whom they owe care and protection.[37] Another rule of construction is that in a grant by the sovereign nothing passes by implication.[38] Holt State Bank extends this rule to a situation relating to Indian lands and to the equal footing-implied trust doctrine. Although Holt State Bank did not deal with a claim presented by Indians and although the United States is not a party to this case, we believe that the rule announced in that decision must apply. It requires a clear and definite intent to convey the beds of navigable rivers which otherwise would pass to a state on admission. Such an intent

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[36] United States v. Shoshone Tribe of Indians, 304 U.S. 111, 116.

[37] Menominee Tribe of Indians v. United States, 391 U.S. 404, 406. The Treaty of Dancing Rabbit Creek provides, Art. XVIII, 7 Stat. 333, 336, that "in the construction of this Treaty wherever well founded doubt shall arise, it shall be construed most favorably towards the Choctaws."

[38] Northern Pacific Ry. Co. v. Soderberg, 188 U.S. 526, 534, and Caldwell v. United States, 250 U.S. 14, 20.

is not shown by the grant of millions of acres of land which are described by perimeters. The responsibility of the United States to the new states is not less than its responsibility to the Indians.

In the final analysis the claim of the Indians rests on inference and implication. Nothing in the treaties, statutes, and conveyances establishes an intent by the United States, as trustee for states to be formed, to convey away property held for the benefit of the new states. When Congress passed the statutes pursuant to the Treaties of New Echota and Dancing Rabbit Creek, the lands covered were undeveloped and virtually unknown. To say that Congress then intended to convey the riverbeds, which over a hundred years later would become valuable because of underlying mineral deposits, is to ignore realities.

In view of the disposition which we make of the case it is unnecessary to consider the jurisdiction of the court over the claim of the Choctaws against the Cherokees or the validity of that claim.

Affirmed.